Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-80

TRUCKDRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 100, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. ———

TRUCKDRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 100, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (App. p. 1a), is reported at 432 F2d 569, 91 LRRM 2849 (6th Cir., 1976); the National Labor Relations Board decision and order (App. p. 7a) are reported at 216 NLRB No. 176, 88 LRRM 1652 (1975), which affirmed the decision and order of Administrative Law Judge Cohn (App. p. 9a).

JURISDICTION

The judgment of the Court of Appeals was decided and filed on March 24, 1976. Petition for rehearing was filed on April 7, 1976 and denied on May 7, 1976. On May 12, 1976, Petitioner (hereinafter referred to as the "Union") was granted a thirty (30) day stay of the mandate pending application to this Court for Writ of Certiorari. On June 21, 1976, the Union was granted an additional thirty (30) day stay of the mandate. This petition was timely filed within ninety (90) days. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether in a refusal to bargain case the National Labor Relations Board may, under Section 8 (d) [29 USC 158(a)] of the Labor Management Relations Act of 1947, as amended, compel a union to execute a collective bargaining agreement which under accepted principles of contract law would not be binding on the parties under Section 301 of the Act, [29 U.S.C. 185].

II. Whether the National Labor Relations Board has authority to compel a union to execute a collective bargaining agreement which offends federal labor policy because it contains an incomplete arbitration clause.

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, as amended [29 U.S.C., sec. 141, *et seq.*] (the "Act"), are as follows:

> Section 8 (b) [29 U.S.C. 158 (b)]: It shall be an unfair labor practice for a labor organization or its agents . . .
> • • •

> (3) to refuse to bargain collectively with an employer . . .
>
> Section 8 (d) [29 U.S.C. 158 (d)]: To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .
>
> Section 10 (e) [29 U.S.C. 160 (e)]: The Board shall have power to petition any court of appeals of the United States . . . for enforcement of such order and for appropriate temporary relief or restraining order . . .
>
> Section 203 (d) [29 U.S.C. 173 (d)]: Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.
>
> . . .
>
> Section 301 (a) [29 U.S.C. 185 (a)]: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Prior to 1973, the Duro Paper Bag Manufacturing Company (the "Company") and Truck Drivers, Chauffeurs and Helpers Local Union No. 100 (the "Union") were parties to the Teamsters National Master Freight Agreement. In 1973, Company withdrew from the multi-

employer group which negotiated the national agreement, and requested separate negotiations with the Union. Therefore in late 1973, the parties commenced negotiations for a new collective bargaining agreement. A dispute arose as to whether or not the Union had agreed to a contract prepared and presented to the Union for signature by the Company on December 8, 1973.

As a result, the Company filed a charge with the National Labor Relations Board (the "Board") alleging that the Union refused to bargain in good faith by refusing to execute the contract in question. A complaint was issued and the Administrative Law Judge of the Board (the "Judge") found that the Union had violated Sections 8(b)(3) and 8(d) [29 U.S.C. 158(b)(3) and (d)] of the Act and recommended that the Union be required to execute the contract submitted to it by Company (App. p. 26a).

This contract of December 8, 1973, provides for the final step of the grievance procedure, as follows (App. p. 38a):

> "The Company and Business Representatives have jointly drawn up a list of reputable qualified arbitrators (See exhibit # 1 at the end of this agreement.)
>
> When a grievance cannot be resolved in steps 1, 2 and 3 of this Article it shall be submitted for hearing before an Arbitrator selected by mutual agreement from the list referred to above."

In fact, there is no Exhibit 1 to the contract, and never has been; none was submitted in the Board proceeding and there has never been a jointly drawn up list of arbitrators.

The Union filed exceptions to the Judge's decision[1] con-

[1] Other issues raised included failure to satisfy condition precedent of membership ratification, which was known to the Company; indefinite duration of the contract; and lack of mutual agreement on other items in the agreement.

tending *inter alia* that it could not be compelled to execute an agreement which on its face was incomplete because of the lack of an agreed list of arbitrators. Although the Judge's decision contained no discussion or finding on this issue (App. pp. 17a, 18a), the Board completely ignored this question and issued its standard boilerplate affirmance of the decision (App. pp. 7a, 8a).

The Board sought and was granted enforcement of its order in the Sixth Circuit Court of Appeals pursuant to Section 10(e) of the National Labor Relations Act, as amended [61 Stat. 136, 73 Stat. 159, 29 U.S.C. sec. 160(e)]. Again the same issue was raised by the Union but it was dismissed by the Court on the grounds that, "the Board is not strictly bound by the technical rules of contract law", citing *Lozano Enterprises* v. *NLRB*, 327 F2d 814, 818 (9th Cir., 1964). This petition seeks to obtain relief from that order.

REASONS FOR GRANTING WRIT

I. The Decision of the Sixth Circuit permitting the Board to apply different standards in Section 8(d) cases than the courts would apply under Section 301 violates this Court's mandate to fashion a single national body of labor law

The Board in this case has ordered the Union to sign a collective bargaining agreement which provides for the settlement of all disputes by arbitrators selected from an agreed list when in fact, the contract does not contain any such list.

The question here presented is whether the Board, under Section 8 (d) [29 U.S.C. 158 (d)], may order a union to execute a contract which, on its face, is contrary to federal labor policy encouraging arbitration and which by accepted principles of contract law would be unenforceable in a suit under Section 301 [29 U.S.C. 185].

A. Circuit Court's affirmance of Board's Order is contrary to federal labor law objectives

It need not be argued that the broad Congressional objectives of industrial stabilization and labor peace can best be attained by *mutually agreed* upon methods of arbitration and grievance settlement. Labor Management Relations Act sec. 203 (d) [29 U.S.C. sec. 173 (d)]; *Arnold Co.* v. *Carpenters District Council,* 417 U.S. 12 (1974); *Gateway Coal* v. *Mine Workers,* 414 U.S. 368 (1974); *Steelworkers* v. *American Mfg.,* 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation,* 363 U.S. 574 (1960). In *Warrior & Gulf Navigation, supra* at 580, 581, this Court recognized that "the collective bargaining agreement is an effort to erect a system of industrial self-government", and that the arbitration system is "actually a vehicle by which meaning and content is given to the collective bargaining agreement". "It is the arbitrator's construction which is bargained for." *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960). Clearly the arbitration clause of any collective bargaining agreement is a *substantive* provision to which the Board is without power to compel agreement. *H. K. Porter* v. *NLRB,* 397 U.S. 99, 102-109 (1970).

Imposing a collective bargaining agreement upon another party without the completely agreed upon vehicle for reaching these objectives is a direct contradiction to the Act and completely frustrates federal labor policy. For example, in this case, any grievances which arise under the contract which cannot be settled by the parties must be resolved by an arbitrator picked from the jointly drawn list. The Company could take the position that the only joint drawn list of arbitrators is that which it will propose and that any other list will not be considered "jointly drawn" or acceptable. Ordinarily, if the question arose before the execution of a contract, the Union would have a right to take economic action to force a fair resolution of this dispute. Here, however, the Board order conceivably forecloses such an option because the Union is obligated by the contract not to engage in any strike or work stoppage. Although the no-strike clause is always the *quid pro quo* for a workable provision,[2] such would not be the case. It has the choice of taking the Company's arbitrators or not arbitrating. In short, the Board order puts the Union at the mercy of the employer for the resolution of disputes under the contract or forces it to engage in a strike because there is no enforceable arbitration clause. *Boys Market, Inc.* v. *Retail Clerks,* 398 U.S. 235 (1970). Either course is hardly in furtherance of the stated policy of the Act to stabilize labor relations. *Cf. Stackhouse Oldsmobile, Inc.* v. *NLRB,* 330 F2d 559 (6th Cir., 1964).[3] On this premise alone the Board's order should not stand.

---

[2] *Teamsters Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368 (1974).

[3] In *Stackhouse,* the Sixth Circuit recognized the important federal policies and refused to require an employer to sign a negotiated agreement because to insist on the incorporation of a disputed union security clause would not contribute to the stability of labor relations. The contested clause placed a burden on the employer to ascertain if it was being legally applied.

B. The Court's Decision permits the Board to create a body of contract law different than that applied by federal courts.

The foregoing emphasizes the importance that must be placed on delineating the essential elements which lead to establishing a binding labor agreement under both Sections 8 (b) (3) and 8 (d) and Section 301 (a) of the Act.

Although a large body of federal labor law has been fashioned pursuant to this Court's holding in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), until now it has been assumed that both the Court and Board would apply accepted principles of contract law to determine if an agreement has been reached and/or was enforceable. Notwithstanding that the Court has recognized that a collective bargaining agreement is not an ordinary contract, *Transportation Union* v. *UPR,* 385 U.S. 157 (1966); *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), this Court, in interpreting labor agreements, has refused to accept doctrines which "do violence to accepted principles of contract law". *Teamsters Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962). Thus, when the judicial inquiry centers on the existence or non-existence of an agreement, it has been assumed that "the essentials of a collective bargaining contract are [the same as] those found in the law of contracts: There must be a meeting of the minds by acceptance of an offer, the terms agreed on must be definite, etc.", Williston on Contracts, Third Edition, Section 1020A. The Seventh Circuit appears to agree. *See Means & Co.* v. *NLRB,* 377 F2d 683 (7th Cir., 1967). Even the Ninth Circuit in *Lozano Enterprises* v. *NLRB,* 327 F2d 814, 818 (9th Cir., 1964) cited by the Court of Appeals (App. p. 6a) for the proposition that "the technical rules of contract do not necessarily con-

trol *all* decisions in labor-management cases", also notes that "the normal rules of offer and acceptance are generally determinative of the existence of a bargaining agreement". *Means & Co., supra* at 686.

Accepted principles of contract law require mutual assent on all essential terms of an agreement in order for a contract to exist. *Minneapolis & Co. Ry.* v. *Columbus Rolling Mill,* 119 U.S. 149 (1886); *Insurance Co.* v. *Young's Administrator,* 90 U.S. 85 (1874) and *Eliason* v. *Henshaw,* 17 U.S. 225 (1819). Where the contract is a unit and it is left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem,* and therefore, neither is bound. *Natl. Bank* v. *Hall,* 101 U.S. 43 (1879). A labor agreement, incomplete on its face on an essential term, like any other agreement should not be enforceable where the "indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms makes it unfair to enforce the remainder of the agreement". Williston on Contracts, Third Edition, Section 48; *United States* v. *McMullen,* 222 U.S. 460 (1912); *Bondy* v. *Harvey,* 62 F2d 521, 524 (2nd Cir., 1933), pet. for writ of cert. denied 289 U.S. 740 (1933); *Palmer* v. *Aeolian Co.,* 46 F2d 746 (8th Cir., 1931), pet. for writ of cert. denied 283 U.S. 851 (1931). This principle is particulary applicable to the arbitration clause of a collective bargaining agreement which is the vehicle chosen by the parties to give meaning and content to the agreement, *Warrior & Gulf Navigation, supra.*

The Sixth Circuit in stating that technical rules of contract law do not bind the Board has, in effect, held that the Board, under Sections 8 (b) (3) and 8 (d), may require the parties to a labor agreement to do less to bind them than the Court would require under Section 301. However, since a contract which the Board requires be executed under

Section 8 (d) must eventually be enforced under Section 301, consistent principles of contract law must be applied in both instances. In this case, the Sixth Circuit has embarked upon a dangerous departure from the policy of establishing consistent principles of labor law by indicating that the Board may establish different principles of contract law under Sections 8 (b) (3) and 8 (d). Under this holding, the forum alone might be the controlling factor in determining the existence of a contract, a result condemned by this Court in *Howard Johnson Co.* v. *Hotel Employees,* 417 U.S. 249 (1973).

Although it has been assumed that accepted principles of contract law apply in Section 301 cases, the Court has not directly stated just what elements are necessary to reach a binding labor agreement or to what extent accepted principals of contract law will apply to the body of federal labor law created since *Lincoln Mills, supra.* Likewise, the Court has not stated whether the Board's criteria to order the execution of an agreement under Sections 8 (b) (3) and 8 (d) should be the same as the Court's criteria for enforcement under Section 301. At least one circuit has raised interesting questions on the Board's authority in this area. *See Genesco, Inc.* v. *Joint Council 13,* 341 F2d 482 (2nd Cir., 1965).

The body of federal labor law has grown by leaps and bounds since 1957. Its increased interplay with the authority of the National Labor Relations Board makes it essential that in its area in which the authority of the courts and the Board overlap, the principles of law governing be the same. In the light of *Howard Johnson Co., supra,* the Court should now make clear that the Board is without authority to go beyond accepted principles of contract law applicable to federal courts in determining

whether a union or employer have come to an agreement which requires execution under Sections 8 (b) (3) and 8 (d) of the Act.

It is Congressional policy to encourage the employer and the representative of the employees to establish through collective negotiations their own charter for the ordering of industrial relations thereby minimizing industrial strife. *Teamsters Local 24* v. *Oliver,* 358 U.S. 283, 295 (1959). Total assent to an arbitration clause in an agreement is an essential element without which there can be no agreement.

CONCLUSION

For the foregoing reasons, the Union respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 75-1659

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. TRUCKDRIVERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 100, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondent.*	ON APPLICATION for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed March 24, 1976.

Before: PECK, Circuit Judge, MARKEY, Chief Judge, United States Court of Customs and Patent Appeals,* and ENGEL, Circuit Judge.

PECK, Circuit Judge. This case is before the court upon application of the National Labor Relations Board for

* Sitting by designation.

enforcement of its order issued against Truckdrivers, Chauffeurs and Helpers Local Union No. 100 International Brotherhood of Teamsters [Union].

Duro Paper Bag Manufacturing Company [Company], the charging party, does most of its own carrier work and employs approximately twenty drivers. The Union has represented the Company's drivers for the past ten years and prior to the 1973 negotiations the Company had signed both the Teamsters Master Agreement, which expired June 30, 1973, and an addendum, which expired in about October 1973, covering local working conditions.

On March 28, 1973, the Company notified the Union that it intended to bargain with the Union on its own behalf for an entire collective bargaining agreement. The Company and the Union held negotiating meetings on November 17, November 29, and December 7, 1973. The Company was represented by Employee Relations Director Rains, and the Union by Business Agent Jack O'Banion and three members of a negotiating committee. At the first meeting Rains indicated that he had authority to consummate an agreement and in response to Rains' question as to whether O'Banion had the same authority, O'Banion replied, "Let's go on," and the parties then exchanged proposals. By the third meeting, the parties had resolved their differences as to all but two major contract provisions, the grievance procedure and wages. The dispute regarding the grievance procedure revolved around the Company's proposal that the Federal Mediation and Conciliation Service be the source of arbitrators. Rains proposed instead that each party draw up its own list of arbitrators and according to Rains' testimony (which the administrative law judge and the Board credited), the Union was agreeable to that, and proceeded to a discussion of wages.

On the issue of wages, the Union had proposed substantial increases for pickups and deliveries, which proposal the Company had rejected. Alternatively, the Union suggested that the drivers be paid on an hourly rate for such work. After protracted discussion, Rains hit the table, stood up and said, "You got it." Then, according to Rains' credited testimony, Rains advised the Union negotiators that the agreement would be typed and sent to them the following day. He then shook hands with the four men and left. Business Agent O'Banion agreed generally with Rains' testimony as to the December 7th meeting. However, O'Banion testified that the three committeemen would not accept the grievance procedure and therefore, would not recommend it to the other drivers.

On December 8, Rains had the agreement typed and that evening he telephoned O'Banion to secure final agreement as to five items upon which there was understanding, but which required the technical language to be cleared by the Company's attorney. These items were: (1) a driver protection clause; (2) a list of management representatives, upon whom a driver could call regarding problems with work; (3) transfer of title clause, protecting the Union in the event of a sale of the Company; (4) a cost of living clause; and (5) a list of management suggested arbitrators. These items were agreed to by O'Banion.

Within the next few days, Rains submitted the written agreement to the Union, but he never received it back and was unable to reach O'Banion by phone in order to determine what had happened. On or about December 15, the Union had a meeting and, by secret ballot, unanimously voted down the Company's proposal. On December 29, Rains was told the Job Steward had notified the Company not to put the new rates into effect or there

would be trouble. On March 23, 1974, O'Banion advised Rains that the Union would not accept the contract and urged the Company representative to sign the Teamsters Master Freight Agreement, which Rains refused to do. On March 30, 1974, the parties met and the Company maintained it had a binding contract but wished to resolve any difference which endangered the employer-employee relationship. No resolution was forthcoming.

The Union's position has been and is that: (1) there was never an agreement reached between the parties; and (2) even if such agreement was reached, a condition precedent to the consummation of such agreement was ratification by the membership, and the Company was at all times aware of such condition precedent. The administrative law judge found and the Board adopted the finding, "that the members of the Union's negotiating committee, on and after December 7, 1973, concluded that they had negotiated a binding agreement with the Company even though they may have felt that they should submit any agreement they negotiated to the membership for approval." The administrative law judge further found that neither past practice nor the International Union's constitution was sufficient to put the Company on notice that ratification by the membership was a condition precedent to conclusion of a binding collective bargaining agreement. The administrative law judge rejected, in light of all circumstances including demeanor considerations, testimony of the three Union committeemen that Rains was told of the necessity for member ratification. Instead, he found that the actions of the Union representatives were such as to lead Rains to believe they had authority to negotiate to a final agreement.

In light of the above findings, the Board concluded that by refusing to execute the collective bargaining agreement

with the Company, the Union engaged in unfair labor practices within the meaning of the National Labor Relations Act § 8 (b) (3), and ordered the Union to cease and desist from these unfair labor practices and if requested to do so by the Company, to sign the proposed agreement.

Section 8 (b) (3) of the National Labor Relations Act provides that: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer. . . ." This court has held that this provision requires that when the parties reach an agreement they have a duty to execute a written contract. *Standard Oil Co.* v. *N.L.R.B.*, 322 F.2d 40, 45 (6th Cir. 1963). Whether or not an agreement has been reached between the parties is a question of fact for the Board to determine, and we "are charged by statute and case law, . . . to uphold factual findings of the Board which are supported by substantial evidence on the record viewed as a whole." *Adams Potato Chips, Inc.* v. *N.L.R.B.*, 430 F.2d 90, 93 (6th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

Although the testimony of the key witnesses for the parties in this case conflicts in several respects, there is clearly substantial evidence in the record viewed as a whole from which the Board could conclude that an agreement was reached. The administrative law judge and the Board chose to credit the testimony of the Company's witness, Rains, and the "credibility of witnesses is within the 'special province' of the Board, which not only has experience and expertise in labor disputes, but also has the benefit of the [administrative law judge's] observations as to demeanor evidence." *Adams Potato Chips, Inc.* v. *N.L.R.B.*, *supra* at 94. Furthermore, in determining whether the parties have in fact reached agreement under a particular

set of circumstances, the Board is not strictly bound by the technical rules of contract law. *Lozano Enterprises* v. *N.L.R.B.*, 327 F.2d 814, 818 (9th Cir. 1964).

As to the Union's contention that ratification by its membership was a condition precedent to conclusion of an agreement, while a Union's membership may require ratification by the membership, *Houchens Market* v. *N.L.R.B.*, 375 F.2d 208, 212 (6th Cir. 1967), an employer may rely upon the apparent authority of the Union representatives to conclude an agreement, where there is a basis for such reliance. *International Union of Elevator Constructors, Local No. 8, AFL-CIO,* 185 N.L.R.B. 769 (1970), *enforced* 465 F.2d 974 (9th Cir. 1972). There is substantial evidence in the record of the instant case from which the Board could conclude that the employer reasonably relied upon the representations of the Union negotiators that they had the authority to bargain to final agreement.

We conclude that substantial evidence supports the Board's findings that there was an agreement reached between the parties and that the Union acted in violation of the National Labor Relations Act § 8 (b) (3) in refusing to execute that agreement.

Enforcement of the Board's order is granted.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 9—CB—2608

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 100, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

DURO PAPER BAG MANUFACTURING COMPANY

DECISION AND ORDER

On October 16, 1974, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel and Charging Party filed answering briefs.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings,[1] findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Covington, Kentucky, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. March 14, 1975.

. . . . . .

Howard Jenkins, Jr., Member

. . . . . .

Ralph E. Kennedy, Member

. . . . . .

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[1] We are satisfied that the Respondent's assertion that the Administrative Law Judge was hostile during the hearing is without merit. In our opinion there is nothing in the record to suggest that his conduct of the hearing, his resolutions of credibility, or the inferences he drew were based on bias, prejudice, or hostility.

[2] We agree, for the reasons expressed by the Administrative Law Judge, that the cited provision of the International Union's constitution provides no support for Respondent's argument that the Company understood and agreed that any agreement arrived at during negotiations was subject to ratification by the membership before it became binding. Furthermore, the record additionally shows that the cited provision relates specifically to "Strike Action by Local Union" and not, as herein involved, to whether Respondent's bargaining committee had authority to enter into a binding collective-bargaining agreement.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case 9-CB-2608

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 100, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

DURO PAPER BAG MANUFACTURING COMPANY

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for the General Counsel.
Jonas B. Katz, Esq., (*Gettler & Katz*),
Cincinnati, Ohio, for the Respondent.
Paul H. Tobias, Esq., (*Goldman, Cole & Putnick*),
Cincinnati, Ohio, for the Charging Party.

DECISION

Statement of the Case

ROBERT COHN, Administrative Law Judge: This case was heard in Cincinnati, Ohio, on June 26, 1974, pursuant to a charge filed the preceding March 26, and a complaint issued May 8. The complaint alleges, in essence, that since on or about December 8, 1973, the Re-

spondent Union has failed to bargain collectively in good faith with Duro Paper Bag Manufacturing Company (herein the Employer or Company), in violation of Section 8 (b) (3) of the National Labor Relations Act, as amended, (herein the Act), when, following negotiations, it failed and refused to execute a collective-bargaining agreement reached the previous day. Respondent, by its duly filed answer, denied the commission of any unfair labor practices.

Following the trial, counsel for all parties filed written briefs, which have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due considerations of the briefs filed by all parties, I make the following:

Finding of Fact

I. Commerce

The employer, a Kentucky corporation, has its principal office and place of business in Covington, Kentucky, where it is engaged in the manufacture of paper bags, and related products. During the past 12 months, a representative period, the Company in the course and conduct of its business, received gross revenues in excess of $500,000 from the sale of its products. During the same period of time, the Company caused to be shipped in interstate commerce, goods and products valued in excess of $50,000 directly to its Kentucky locations from points outside the state of Kentucky.

I find, as the Respondent admits, that the Company is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

II. The Labor Organization Involved

Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Respondent or Union) is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

For several years prior to the events here at issue, the Company and Respondent have been parties to collective-bargaining agreements covering the Company's truck drivers.[1] In the past, the Company was a signatory of the National Master Freight Agreement which covered the basic provisions relating to wages, benefits, grievance procedure, and the like. To that agreement, the Company and Respondent negotiated an "addendum" which covered local conditions such as pay for pickups, work rules, etc.[2]

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[1] The drivers number approximately 20, and consist of both over-the-road and local cartage drivers. Another labor organization with whom the Company bargains, represents the Company's production employees.

The complaint alleges, and the answer admits that the drivers are bargained for by the Respondent in the following appropriate units:

> All truck drivers employed by the Employer at its plant in Ludlow, Kentucky, excluding office clerical employees and all guards, professional employees and supervisors as defined in the Act, and all other employees of the Employer.
>
> All truck drivers employed by the Employer at its plant in Covington, Kentucky, excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act, and all other employees of the Employer.

[2] See General Counsel's Exh. No. 13.

The master agreement expired on June 30, 1973,[3] and the Company apparently decided at about that time to negotiate individually with Respondent respecting a new collective agreement.[4]

Jack Rains, Director of Employee Relations for the Company, commenced his attempt to schedule negotiating meetings with Respondent in June, but was unsuccessful, assertedly due to the obstinateness of the Union, until October. At that time the Company filed an unfair labor practice charge with the National Labor Relations Board (herein the Board) claiming that the Respondent violated the Act by its refusal to meet and bargain with the Company. Apparently that charge had the desired effect since it resulted in the scheduling of the first negotiating meeting to take place on November 17.

B. The Negotiating Sessions, and Their Aftermath

Present for the Company at the first meeting was Rains; present for the Union were the business agent, Jack O'Banion, along with employees Claude Kidd (job steward) and Joe Underwood, a driver. At that meeting little was accomplished other than the exchange by the parties of their respective proposals for a new collective-bargaining agreement, and the scheduling of the next meeting for November 29. However, according to the testimony of Rains, which I credit, the following colloquy took place between him and O'Banion respecting the respective authority of the two men to negotiate a contract:

> Q. Did he at any time ask you whether or not you had authority to agree to hours?

[3] All dates hereinafter refer to the calendar year 1973, unless otherwise indicated.

[4] The addendum was scheduled to expire in October.

> A. He asked me that the first day we met, if I had the authority to consummate such an agreement that I presented to him on the 17th day of November. And I said, "Jack, if I wouldn't have it, I'd send a messenger boy up here who we pay $1.99 an hour."
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> And he said, "Fine."
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> I said, "Do you have authority?"
>
> And he said, "Let's go on."
>
> And we started reading the document that I presented to him. That was on the 17th day of November.

A second meeting between the parties was held on November 29, and a third and final meeting looking toward the consummation of a collective-bargaining agreement was held on December 7.[5] The last meeting was a rather lengthy one and substantial progress was made with respect to agreement on most items in the contract. However, near the close of the meeting, two major items remained for resolution: (1) grievance procedure and (2) wages.

As respects the difference between the parties on the grievance procedure, it appears that under the Master Agreement the procedure required, *inter alia,* that where the parties were unable to resolve the grievance at the local level, they were required to go to Columbus, Ohio, for final resolution by a board composed of both management and union representatives. This was time consuming and costly, and the drivers apparently did not like it. The Company therefore had proposed a grievance and arbitration procedure culminating in arbitration at the local level, and had proposed the Federal Mediation and Conciliation Service as a source of arbitrators. When the Union balked

[5] At this last meeting the same people were present as previously with the addition of Jim Brown, Shipping Superintendent for the Company, and Jerry Rigney, a truckdriver, for the Union.

at the proposal, Rains suggested that both parties draw up a list of local arbitrators. According to Rains' testimony, the Union was agreeable to that, and proceeded to a discussion of wages.

As respects the issue of wages, the Union had proposed substantial increases for pickups and deliveries.[6] When the Company balked at paying such increased rates, the Union suggested that the drivers be paid on an hourly rate for such work. After some heated discussion, Rains hit the table, stood up and said "you got it (the hourly rate)." Rains then advised the four union men that the agreement would be typewritten and sent to them the following day. As Rains was preparing to leave O'Banion expressed some concern as to whether Rains' job might be in jeopardy in view of the concession that he made with respect to the wages, but Rains responded that he could handle that. He then shook hands with the four men and left.[7]

The following day December 8, Rains had the agreement typed. That evening he telephoned O'Banion to

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[6] The previous addendum prescribed various rates for unloading "straight one stop loads" and various stops thereafter, and other rates for picking up loads which are less than 20,000 pounds. See General Counsel's Exh. No. 13.

[7] The foregoing findings are based upon the credited testimony of Rains which was not substantially impaired by that of O'Banion. As he testified on cross-examination, O'Banion agreed that there were two major issues still open near the close of the December 7 meeting, i.e., grievance procedure and wages; that Rains put in a proposal with respect to grievance procedure and then moved on to the area of hours in which he acceded, as above described; that there was a general shaking of hands after which Rains left. O'Banion refrained from bluntly declaring that there was no agreement at the close of the meeting; however, he testified on direct examination that the three committeemen "would not accept the grievance procedure and therefore, would not recommend it to the other drivers."

secure final agreement with respect to five items upon which there was understanding but which required the technical language to be cleared by the Company attorney. Those clauses were: (1) The driver protection clause, which secured to the employee-drivers the right to haul the Company's freight before using outside carriers; (2) a list of management representatives whom a driver could call in the event that there was a problem in connection with his work; (3) a transfer of title clause which protected the Union in the event of a sale of the Company; (4) a cost of living clause; and (5) a list of management-suggested arbitrators for the grievance procedure. These were agreed to by O'Banion who, again, expressed concern to Rains respecting the latter's job.

Within the next couple of days, Rains submitted the proposed written agreement to the Union by leaving it in the Company's guard house to be picked up by a Union committeeman. He never received it back executed. Thereafter, Rains called O'Banion on several occasions to inquire what had happened, but was unable to reach him. On or about December 29, according to Rains' testimony, Superintendent Brown told Rains that job steward Kidd had stopped in at Brown's office and told him not to put the new rates into effect-that if he did, there would be trouble. Kidd related that the drivers did not like the work rules and that they were not signing the agreement. Rains assured Brown that this was "loose talk" and not to be concerned about it.

Meanwhile, on or about December 15, the Union had a meeting in which a vote by a secret ballot was held on whether to accept the Company's proposal. It was voted down unanimously.

On March 23, 1974, O'Banion came to Rains' office to advise that "the boys don't like your contract and we're

not going to accept it. I've got copies of the Master Freight Agreement here and I want you to sign." Rains responded that he did not intend to sign the Master Freight Agreement, that the Company had negotiated a binding contract in good faith. O'Banion replied that he would leave the Master Freight Agreement with Rains until March 30 to decide whether the Company wished to sign it; that if it did not, a picket line would be placed about the Company premises. After O'Banion left, Rains asked the drivers who accompanied him to stay for a moment, and he interrogated them as to what they did not like. They responded that it was the grievance procedure – they did not like the arbitration provisions.

On March 30, there was a meeting among the parties[8] to explore what was required to achieve agreement. At that meeting, the Company maintained that they had a binding contract but that they were meeting in an effort to resolve any differences which endangered the relationship should the agreement be placed into effect. At that meeting, according to Rains' testimony, it appeared that the drivers and O'Banion were at odds concerning some unexplained matter, and that the problem was not simply a resolution of the grievance procedure.[9]

No resolution of the contract was accomplished at the March 30, meeting. It appears that the Union was insisting that the Company sign the Master Freight Agreement

[8] Rains and Brown for the Company; O'Banion, Kidd, Underwood and another driver for the Union.

[9] There was some intimation in the record that this feeling had ripened into a major dispute between the Union leadership and the drivers to the extent that the latter had hired a lawyer to represent them. However, this was not developed on the record since it appeared to be outside the scope of the issue to be resolved in this proceeding.

while the Company took the position that an agreement had already been negotiated, which the Union refused to sign.

Analysis and Concluding Findings

The Respondent defends this case on the grounds that: (1) There was never an agreement reached between the parties as to the substantive provisions of the contract; and (2) even if such agreement was reached, a condition precedent to the consummation of such agreement was the ratification by the membership, and the Company was at all times aware of such condition precedent. Therefore, since the Company's proposed contract was rejected by the membership, no agreement was reached which is obligatory for the Union to execute. I find that there is a lack of substantial evidence in the record to substantiate these contentions.

Thus, as set forth above, it is agreed between the parties that near the close of the December 7 meeting, only two principal issues separated them from agreement – grievance procedure and wages. I have found, based upon the credited testimony of Rains, that the Union finally agreed to his proposal respecting grievance procedure and that he gave in to the Union proposal respecting wages. However, even if – as there is some record evidence to suggest – the Union committeemen did not like the grievance procedure proposal, there is no substantial evidence that they voiced such objection at the close of the December 7 meeting. Even if they did, there is no evidence that O'Banion, in his telephone discussion with Rains the following day, indicated in any way that the Company's proposal respecting grievance and arbitration was not acceptable to the Union. Finally, it is evident that the Union

committee considered the Company's final, written document (GC Exh. No. 11) to be a proposed contract which they would vote to accept or reject in its entirety, and not piecemeal.[10]

In view of the foregoing, I find and conclude that the members of the Union's negotiating committee, on and after December 7, concluded that they had negotiated a binding agreement with the Company even though they may have felt that they should submit any agreement they negotiated to the membership for approval.[11] However, Respondent argues that based upon (1) The constitution of the International Union, (2) past practice at the Company's plant, and (3) testimony of Respondent's witnesses at the trial, it is clear that the Company understood and agreed that any agreement reached at negotiations was subject to ratification by the membership before it became binding.

The provision of the International Union's constitution cited by Respondent in its brief (page 4)[12] states in pertinent part;

> (b) Contracts may be accepted by a majority vote of those members involved in negotiations and voting, or a majority of such members may direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive Board. When in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership and can be rejected only by a two-thirds (2/3) vote of the members involved in the negotiations and voting or responding to a referendum mail ballot.

[10] On cross-examination, O'Banion conceded that when Teamster members vote, they do so on a whole contract and not piecemeal.

[11] O'Banion, on cross-examination, conceded that after the December meeting had concluded, "it was the negotiating committee who suggested to [him] to take the offer back to the members."

[12] The provision cited in the brief is "Article XI, Section I(b);" however, such citation must have been a typographical error since there is no such Section in Article XI. Rather, there is a Section 1(b) in Article XII which appears to be related to the issue involved.

It would seem possible to construe the foregoing quotation as much against Respondent's position as in favor of it since it provides that "contracts may be accepted by a majority vote of those members involved in the negotiations and voting . . . ." It is true that the provision provides further that "when, in the judgment of the Local Union Executive Board, an employer has made an final offer of settlement, such offer must be submitted to the involved membership . . ." However, there is no evidence in the instant case that the Local Union Executive Board took any action in this matter. Under all circumstances, I am not convinced that the International Union's constitution provides the support of Respondent's position that is claimed.

As respects past practice, the record shows that in prior years the Company adopted the National Agreement and negotiated locally only the addendum which, as above noted, had to do primarily with the wages for pickup and deliveries, and local work rules. It appears that the procedure for negotiating the addendum was the for the business agent of the Respondent to meet with either the president of the Company or Mr. Rains and negotiate an agreement. It was then the practice for the business agent to go outside the Company's office where the negotiations took place, discuss the agreement with the drivers who congregated in another office, and secure their approval or disapproval on the spot. This practice, argues the Respon-

dent, clearly shows that the Company was always aware that any agreement reached in the 1973 negotiations was subject to ratification by the membership. I cannot accept this argument in the light of significant changes which occurred in 1973.

Thus, the whole character of the negotiations changed. Rather than negotiating simply an addendum to a national contract, the 1973 negotiations involved several meetings wherein the discussions broadened to negotiating a whole new collective-bargaining agreement. This required a more formalized procedure ,and the Respondent appointed or elected a negotiating committee which, as above described, met with the Company's representative, and hammered out, over a series of meetings, what purported to be a new contract. It was this obvious difference in the procedure which prompted Rains, at the first meeting, to inquire of O'Banion whether the latter had the requisite authority to negotiate, and he replied "Let's go on." This response certainly constituted a clear implication to Rains that the answer to his question was affirmative. Moreover, I deem it significant that as of January 5, 1973, the Respondent posted on the employees' bulletin board a notice to the effect that O'Banion was to serve as Respondent's business agent and that only he (with the exception of the president and secretary-treasurer of the local) had the *"authority to conclude a collective-bargaining agreement or to alter or waive the terms of such agreement."* (Emphasis in original) [13]

In light of the foregoing notice and the change in the character of the negotiations, as well as the implied admission of O'Banion in the first meeting of the parties above

[13] See General Counsel's Exh. No. 12.

described, I conclude that past practice was not sufficient to put the Company on notice that ratification by the membership was a condition precedent to conclusion of a binding collective-bargaining agreement.

Finally, the Respondent argues that the Company was put on notice of the need for ratification by the repeated statements to that effect made by members of the negotiating committee during the 1973 negotiations. These committeemen, testifying on behalf of Respondent, stated that during the negotiations they repeatedly emphasized to Rains the necessity for taking the matter back to the membership. For example, the testimony of Jerry Rigney:

> We told him [Rains] – at the ending of everything we always told him that we'd have to take those back before the men.

Joseph Underwood testified:

> Yes, it was mentioned to Mr. Rains on three different occasions by myself, that as far as the authority of the committee, drivers' committee, that we had no authority to agree to anything. We would negotiate it and take it back to the membership, back to the drivers for a final approval by them. . . .

However, in addition to the categorical denial by Rains of such notification, the above testimony is, in my view, substantially impeached by the testimony of O'Banion, who was, of course, the principal negotiator for Respondent. Thus, he did not deny Rains' testimony, above referred to, that the negotiating committee of Respondent had authority to conclude an agreement, and further testified, on cross-examination that it was only after the conclusion of the December meeting that the negotiating committee sug-

gested to him that the offer of the Company be taken back to the membership.[14]

In the light of all the circumstances, including demeanor considerations, I consider the testimony of the Union committeemen to be "too good" and that while they may have considered that any action on their part in negotiations would eventually be approved or disapproved by vote of the members, this was not made clear to the Company's negotiator. Consequently, he, in good faith, negotiated an agreement with the Respondent's committee which was, on and after December 8, legally binding.[15]

However, Respondent further contends that the Company was aware that no final agreement was consummated as evidenced by its failure to put into effect the new changes negotiated. But this is understandable in light of the threat of Kidd to Brown on December 29 that a strike was imminent if the Company proceeded to implement the agreement. Moreover, O'Banion testified that there was no particular pressure to implement the agreement because the Company was paying the wages of the Central State's contract as well as "picking up all the holidays, health and

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[14] O'Banion's testimony on this point is as follows:

BY MR. FISHER:

Q. Well, if I understand your answer to the judge previously, it was the negotiating committee who suggested to you to take the offer back to the members; is that correct?

A. Yes, sir.

Q. They suggested it after the meeting was over?

A. Sometime—Well, yeah.

Q. After the meeting was over?

A. Uh-huh.

[15] I have also taken into consideration on this point the lack of any evidence that during the telephone conversation between Rains and O'Banion on December 8, the latter made any reference to the requirement that the agreement was to go before a vote of the membership.

welfare, pension, . . . there was no pressure on me to finish the contract or leave it as is, as far as that goes." Since Rains was occupied in negotiating an agreement during this time with the Union representing the production employees, it is understandable that the matter of signing the contract was held in abeyance for several months in early 1974. Finally, in late March, Respondent formally notified the Company of its refusal to execute the December proposed agreement and insisted on Company agreement adoption of the Master Freight Agreement.

In view of all the foregoing, I find that the defenses of Respondent to the *prima facie* case of the General Counsel do not withstand scrutiny, and I therefore find and conclude that all times on or about December 8, Respondent has failed and refused to execute the agreement consummated on December 7 and 8, in violation of Section 8 (b) (3) of the Act.[16]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with the Company's operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it should be ordered to cease and desist

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[16] *Teamsters, Local 186, (Max Rudolph Trucking Company),* 172 NLRB 788.

therefrom and to take certain affirmative action to effectuate the policies of the Act. It has been found that the Respondent has refused to bargain collectively with the Company as the exclusive representative of all employees in the appropriate units by refusing to execute the collective-bargaining agreement negotiated between it and the Company in December 1973. As the proposed collective-bargaining agreement transmitted by the Company to the Respondent on or about December 8, 1973 embody the terms of the agreement reached on December 7 and 8, it will be recommended that the Respondent be ordered to execute that document.

Conclusions of Law

1. Duro Paper Bag Manufacturing Company is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2 (5) of the Act.

3. The following constitute units appropriate for the purpose of collective-bargaining within the meaning of Section 9 (b) of the Act:

(a) All truckdrivers employed by the Company at its plant in Ludlow, Kentucky excluding office clerical employees and all guards, professional employees, and supervisors as defined in the Act, and all other employees of the Company.

(b) All truckdrivers employed by the Company at its plant in Covington, Kentucky excluding office clerical em-

ployees and all guards, professional employees, and supervisors as defined in the Act, and all other employees of the Company.

4. The Respondent has been, since 1970 and 1974, respectively, the duly recognized exclusive collective bargaining representative of all employees in the units described above for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing on or about December 8, 1973, and at all times thereafter, to execute the collective-bargaining agreement with the Company to which the Respondent had previously agreed, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (3) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[17]

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing upon request of the Company to execute the collective-bargaining agreement agreed to on or about

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[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

December 8, 1973, as embodied in the proposed collective-bargaining agreement transmitted to it by the Company on or about December 8, 1973.

(b) In any like manner refusing to bargain with the Company in accordance with the requirements of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) If requested to do so by the Company, forthwith sign and execute the proposed collective-bargaining agreement transmitted to it by the Company on or about December 8, 1973.

(b) Post at Respondent's offices and meeting places copies of the attached notice marked "Appendix."[18] Copies of said notice, to be furnished by the Regional Director for Region 9, after being duly signed by the Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 9 signed copies of the notice for posting by the Company, said Company being willing, at all locations where notices to employees are customarily posted.

[18] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated at Washington, D.C.

/s/ ROBERT COHN
Administrative Law Judge

Appendix

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL, upon request by DURO PAPER BAG MANUFACTURING COMPANY, execute the agreement reached on or about December 8, 1973, as embodied in the proposed collective bargaining agreement transmitted to us by said employer on or about that date. The bargaining units are:

All truckdrivers employed by the Company at its plant in Ludlow, Kentucky, excluding office clerical employees and all guards, professional employees and supervisors as defined in the Act, and all other employees of the Company.

All truckdrivers employed by the Company at its plant in Covington, Kentucky, excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act, and all other employees of the Company.

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 100, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Rm. 3003, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 513-684-3686).

GENERAL COUNSEL EXHIBIT 11

This Agreement
is made and entered into this FIRST day of
JANUARY, 1974 by and between:

The Duro Paper Bag Manufacturing Company, hereinafter referred to as the "Company" and Local #100 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the "Union."

ARTICLE I – RECOGNITION

1. The Company recognized the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining with respect to wages, hours of work and all other conditions of employment for its truck drivers employed at and dispatched from the Company's Covington Shipping Department.

2. The Company agrees to meet and deal with the Union representatives and/or stewards as designated and authorized by the Union, at times agreeable to both parties, for the purpose of collective bargaining and processing of

grievances or such other items of interest to either party from time to time.

3. Both the Union and Company will keep each other informed, in writing, as to the names of individuals elected to represent them.

ARTICLE II – SCOPE OF AGREEMENT

1. This agreement shall have application to the over-the-road and city drivers employed by this Company and shall not be applicable to the Company employees who are covered by a collective bargaining agreement with a Union not signatory to this agreement, or those employees who are outside the classification of over-the-road or city drivers (described in Article I, Paragraph 1) employed by the Company.

2. All present employees who are members of the Union must remain members of the Union in good standing throughout the life of this agreement. All employees who are not members of the Union on the effective date must become and remain members in good standing with the Local Union, as condition of employment, on and after the 31st day of employment with the Company.

ARTICLE III – NON DISCRIMINATION

1. Both the Company and Union agree there will be no discrimination against any employee because of this Union membership or activity so long as such acts does not interfere with the conduct of the Company's business.

2. The Company and Union further agree not to discriminate against any individual with respect to his hiring, compensation and terms or conditions of employment be-

cause such individual race, color, religion, sex, or national origin.

ARTICLE IV – MANAGEMENT

The Union recognizes and agrees that the Management of the business, including, but not limited to, the direction of the working force; the right to hire, to plan, direct, control; maintain rules and regulations, violations of which shall be among the cause for disciplinary action up to and including discharge. These things are vested in the Company and such rights shall be exercised with due regard for the rights of the employees and consistent with this agreement.

All other rights not specifically nullified by this agreement are retained by the Company.

ARTICLE V –

DUES DEDUCTION, INSURANCE AND PENSION

Section 1. The Company agrees to deduct from the employees earnings the initiation fees and monthly Union dues for all members who present the Company with a voluntary written authorization. Such initiation fees and dues so deducted shall be forwarded, by the Company, to the Union.

Section 2. The Company agrees to make the following contributions to the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds:

Pension		Health & Welfare	
7-1-73	$17.00	7-1-73	$16.50
7-1-74	19.50	7-1-74	19.00
7-1-75	22.00	7-1-75	21.50

Section 3. If an employee is absent because of illness or off the job injury and notifies the Company of such, the Company will continue to make the required insurance premium payments for four (4) weeks and the Pension contributions for a period of four (4) weeks.

If the employee is injured on the job such Insurance and Pension premiums and/or contributions shall continue for a period of 12 months.

Section 4. If an employee is granted a leave of absence as prescribed in Article IX he must remit, to the Company, his monthly Insurance Premium and Pension Fund contribution which the Company will forward to its proper place. Otherwise employees on leave who fail to do so will be cancelled from the plans.

ARTICLE VI – SENIORITY

Section 1. Newly hired drivers must work thirty (30) cumulative work days within any ninety (90) calendar day period before being considered a regular employee. Upon completion of such period of time such employees seniority date shall revert back to his first day worked during such ninety (90) day period.

Section 2. There shall be two seniority structures; one for over-the-road drivers and one for city drivers. When and if a driver is permanently transfered from one status to the other said employee shall be placed on the bottom of the seniority list to which he is transferred.

Section 3. The work force may be increased or decreased at the discretion of the Company but the last man hired shall be the first laid off. Recalls from layoff shall be done by calling back the most senior employee first.

Section 4. An employee's seniority shall end for any of the following reasons:

a. If the employee quits.

b. Discharge for just cause.

c. Employee is absent for three (3) working days without proper notification to the Company unless a reason satisfactory to the Company is given.

d. If, after being laid off, the employee is not recalled by the Company for a period of three (3) years.

In recalling employees from lay-off the Notice of Recall shall be deemed to have been given if mailed to the last address on file with the Company or if given to the employee personally. Employees recalled shall be required to report to work within ten (10) days otherwise the Company may fill the position from whatever sources are available to it.

ARTICLE VII – VACATION AND HOLIDAYS

Section 1. Employees covered by this agreement who have worked sixty percent (60%) or more of the total working days during any twelve month period shall receive a vacation with pay in accordance with the following schedule:

Amount of Vacation	Eligibility Requirements
Six (6) days	One (1) full year (12 consecutive months).
Twelve (12) days	Two (2) full years.
Eighteen (18) days	Ten (10) full years or more.
Twenty-four (24) days	Fifteen (15) full years or more.

Pay will continue to be computed as in past.

Section 2. The following named holidays shall be paid for at the rate of eight (8) hours pay for the holiday whether worked or not and regardless what day of the week they may fall: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, December 24th, Christmas Day and the Employee's Birthday.

Section 3. To be eligible for such holiday pay an employee must:

1. Have been employed more than thirty (30) working days (See Section 1, of Article VI).
2. Have worked the regular work-day immediately preceding and following the holiday, unless absence is due to proven illness, vacation or excused by Company.

ARTICLE VIII – FUNERAL LEAVE

Section 1. In the event of a death of a member of the immediate family (father, mother, wife, husband, brother, sister, son or daughter) of an employee shall be entitled to a maximum of two days off to attend the funeral. Such employee will be paid for the two days upon proof of relationship of the deceased.

ARTICLE IX – LEAVE OF ABSENCE

The Company agrees to grant leaves of absence up to a maximum of ninety (90) days when business conditions permit. No leave will be extended more than a total of twelve (12) months and employees over-staying a leave shall lose his seniority and job rights with the Company.

Employees on leave must make suitable arrangements for continuation of Health and Welfare and Pension Payments before the leave begins (See Article V, Section 4).

Falsifying reasons for a leave of absence and/or employment elsewhere during a leave shall be grounds for discharge.

ARTICLE X – RULES OF CONDUCT

An employee who fails to maintain, at all times, proper standards of conduct or who violates any of the following rules shall be subject to disciplinary action up to and including discharge.

1. Dishonesty.
2. Being under the influence of alcohol or drugs while on duty in service of the Company.
3. Carrying unauthorized passengers.
4. Carelessness or negligence resulting in an accident.
5. Refusal to perform a service as required under this agreement.
6. Leaving a load sit without justification after having been picked or assigned.
7. Fighting on Company property among employees.

ARTICLE XI – DRIVER RESPONSIBILITIES

1. To submit, in writing, the current telephone number and address where he can be contacted at all times. The Company will rely on the last telephone number and address to reach a driver. Any wages or benefits losses due to non compliance with this provision, by the driver, is the fault of the driver.
2. To maintain proper conduct at all times when on the road or in his dealings with a customer.

3. For all items picked up or delivered by him and is required to count all merchandise and report any shortage or over shipments. When a shortage or overshipment exceeds ten (10) bales he must call Duro Shipping Department for instructions before leaving the point of delivery or pick up.

4. Drivers are responsible for their own fines and/or expenses incurred as a result of their violation of road or traffic laws.

5. To keep his physical examination current and in accordance with the Motor Carrier Regulations. Current physical reports must be on file with the Company and any driver found not to have complied with this provision will not be permitted to drive.

6. Driver marking off sick may be required to be examined by Company appointed doctor.

7. Vehicle condition, logs, trip sheets and invoices must be properly filled out and turned in at the Shipping Office at the end of each trip.

8. Any accident must be reported at the end of the trip on which it occurs and before the driver involved goes back on the job.

9. Any absence must be reported to the Company in advance so that replacement may be secured. Failure to report may result in suspension or discharge.

10. In case of emergency — where shipments materialize after the start of board pick time the dispatcher will dispatch the load (s) as the need dictate in order to satisfy the customer (s). Such emergency dispatching will not be construed as a violation of the board picking procedures.

EXPENSES

1. Expense money is to be used for expense on the road only.

2. It is the driver's responsibility to keep his expenses in line; any time a driver has accumulated excess expense monies the Company may limit future advances.

3. No toll road expenses will be reimbursed unless authorized by the Company.

4. All expenditures of parts on the road must be authorized by the Company before the purchase is made.

ARTICLE XII — GRIEVANCE PROCEDURE

Should either party to this agreement or any driver covered by this agreement have a grievance wherein a violation of any specific provision of this agreement has occurred, it shall be processed in the following manner:

Step 1. Between the aggrieved party and a representative of the other party who has been properly designated to handle such matters.

Step 2. If it cannot be resolved in step one above then it must be reduced to writing and submitted to a meeting with the grieved party and the job steward and a Company representative from the Industrial Relation Department.

Step 3. If no settlement can be reached in steps one and two a meeting will be held with the Business Representative of the Local Union and the Company's Industrial Relations Representative.

Step 4. If no settlement is reached in steps one, two

or three the grievance shall, within thirty (30) days from the answer in step 3, be submitted to Arbitration in the following manner:

The Company and Business Representatives have jointly drawn up a list of reputable qualified arbitrators (See exhibit #1 at the end of this agreement.)

When a grievance cannot be resolved in steps 1, 2 and 3 of this Article it shall be submitted for hearing before an Arbitrator selected by mutual agreement from the list referred to above. The Arbitrator so selected shall have full authority to seek out all the facts and render a decision which shall be final and binding. Such decision shall be immediately following the hearing but no later than fifteen days from the date of the hearing.

The cost of the Arbitrator shall be shared equally between the Employer and the Union but any other expenses that either side may incur on its own shall be paid by the party responsible for initiating such expenses.

ARTICLE XIII – BOARD PICKING PROCEDURES

The board shall be picked according to seniority giving the most senior first choice and progressing to the least senior.

TIME

(1) Board Pick Time shall be:

(a) Monday through Friday – 3:30 p.m.
(b) Saturday – 9:30 a.m.
(c) Holiday – Pick time will remain the same

as (a) and (b) above but drivers on the road must call in at pick time.

(2) Drivers on the road at pick time for weekend or holiday loads must call in prior to pick time and leave a telephone number where he can be contacted or he must call in at pick time and make his selection.

(3) There will be a (10) minute grace period. If a driver cannot be contacted at the start of pick time he will have an additional (10) minutes before he is passed on the board.

(4) Drivers must have completed their runs and trucks returned to Company property in order to be eligible to pick the board during the week (Monday through Friday).

(5) When a driver pre-determines that he will not be available at Board Pick Time he must submit in advance of the board pick time and in writing a list of loads of his choice in order of priority. Should additional loads come up after this selection is made the driver forfeits his rights to these loads.

Where a driver has passed the board pick and an emergency new load develops after 3:30 p.m., this driver must be called again and offered the new load before using outside (extra) drivers. Should any driver not be available when called, the Company may get an extra driver to take the load.

(6) Driver must pick the load himself and no one is permitted to pick for another driver.

(7) No loads or equipment are to be switched without the permission of the Company.

(8) If a driver passes his chance to pick a trip the Company is at liberty to use casual drivers after all perminate drivers have had an opportunity to pick the board.

(9) Drivers calling in sick must recall by noon on the day he wishes to be placed on the board to go out again.

(10) Drivers making a practice of marking off sick may be required to furnish a doctor's statement as evidence of such sickness.

(11) The Company will provide each driver with the name and telephone number of individuals who may be called when advice concerning deliveries, pick ups and extra help is required (See attachment).

ARTICLE XIV – WAGES

The hourly wage rates of pay during life of this agreement shall be as follows:

Effective Date	*City*	*Over-the-Road*
1-1-74	$6.39	$6.23
1-1-75	6.69	6.53
1-1-76	6.99	6.83

Over the road drivers shall be compensated mileage pay as follows:

1-1-74	.16325 per mile
1-1-75	.17075 per mile
1-1-76	.17825 per mile

1. Mileage charts will be posted showing regular stops. In large cities with population of more than 500,000, where the point of delivery is beyond the center city Post Office, the Company will agree to pay such mileage based on twenty-five (25) miles regardless what the actual miles may be. In these same cities where the point of delivery is not beyond the center city Post Office mileage will be paid based on center city Post Office mileage.

2. The Company will provide each driver an itemized statement of earnings and deductions.

ARTICLE XV – FULL AGREEMENT–NO STRIKE–NO LOCKOUT

This agreement concludes the full agreement between the Company and Union and resolves all issues and/or disputes whether mentioned or not.

In committment to each the other it is agreed there shall be no strikes by the Union and no lockouts by the Company during the term of this agreement. Any employee or group of employees participating in a strike, work stoppage or slowdown is subject to discharge.

Should a strike, work stoppage or slow-down occur the Local Union must direct the workers to resume normal operations. Failure on the Union to do so is considered a breech of this agreement.

ARTICLE XVI – RENEWAL AND TERMINATION

Section 1. This agreement shall be in effect as of January 1, 1974, and shall remain in effect until January 1, 1977 and from year to year thereafter unless terminated in accordance with the provisions outlined in this article.

Section 2. If either party desires to change any provisions of this agreement it shall give written notice to the other party at least sixty (60) days in advance to the expiration date.

Section 3. The giving of notice as provided in Section 2 above shall constitute an obligation upon both parties to sit down and negotiate in good faith all questions at issue with the intent of reaching a written gareement prior to the expiration date. Failure to give the written notice as provided in Section 2 above shall waive the rights of that party to re-open the agreement for negotiations, in which case the agreement shall automatically renew itself for one full year as written.

Section 4. If the parties have not reached an agreement on or before the expiration date (Provided notice was served and negotiations have taken place) all provisions of this agreement shall remain in effect unless specifically terminated in accordance with the provision outlined below.

Section 5. At any time after the expiration date set forth in Section 1 of this article if no agreement is reached either party may give the other a written notice of its intent to terminate the agreement in no less than ten (10) days. All provisions of this agreement shall remain in full force and effect until such ten (10) days have elapsed. During this ten (10) day period attempts to reach an agreement shall continue. This section does not apply where no 60 day notice was given as prescribed in Section 2 above.

Duro Paper Bag Manufacturing Company

.....

Teamsters Local #100

.....

.....

This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as "Agreement," shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or rights only, are sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation or use of such rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

The employer shall not use outside carriers, if such use of carriers prevents the following employees from the opportunity of earning not less than $200 per week:

Mel Hardin	Claude Kidd
Marshall Webb	E. T. Grigson
J. P. Rigney	Joe Underwood
Gordon Curupper	Al Schneider
Earl Lister	Glenn Brown
Jerry Rigney	Al Grigson
Ed Biddle	Bill Hightchew
Mat Lovett	Marvin Golden

This clause shall only apply to the above mentioned employees.

No. 76-80

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TRUCKDRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1976

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 432 F. 2d 569. The decision and order of the National Labor Relations Board (Pet. App. 7a-29a) are reported at 216 NLRB No. 176.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-6a) was entered on March 24, 1976. A petition for rehearing was denied on May 7, 1976. The petition for a writ of certiorari was filed on July 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board correctly found that the Union and the Company had reached final agreement regarding the terms of the collective bargaining contract, making the Union's refusal to execute the contract a violation of Section 8(b)(3) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pages 2-3.

STATEMENT

1. Prior to 1973, Duro Paper Bag Manufacturing Company ("the Company") was signatory to the Teamsters Master Freight Agreement and to an addendum covering purely local working conditions. In 1973, the Company withdrew from membership in the employer association that negotiated the master agreement and, following expiration of the agreements, informed the Union that it intended to bargain on its own behalf (Pet. App. 11a-12a).

Bargaining sessions were held on November 17 and 29 and December 7, 1973. At the first meeting of the negotiating teams, Union Business Agent Jack O'Banion asked Company Director of Employee Relations Jack Rains if he had the authority to consummate the agreement. Rains replied that he did, and asked the same question of O'Banion. O'Banion replied, "Let's go on" (Pet. App. 12a-13a; A. 123).[1] The parties then exchanged

[1] "A." references are to the printed appendix to the parties' briefs filed in the court of appeals. A copy has been lodged with the Clerk of this Court.

their respective proposals for a new collective bargaining agreement. At the second meeting they reached agreement on many provisions (Pet. App. 13a).

At the end of the third meeting the only differences remaining for resolution concerned the grievance procedure and wages. Differences over the grievance proposals were resolved when the Union acceded to the Company's suggestion that arbitrators be selected by agreement from lists drawn up by the parties, rather than from the Federal Mediation and Conciliation Service (Pet. App. 13a-14a; A. 118-122, 153-154, 179-180). The parties then agreed on the wage issue (Pet. App. 14a; A. 120-123). Rains advised the Union men that the agreement would be typewritten and sent to them the next day (Pet. App. 14a; A. 123).

On the following day, December 8, Rains telephoned O'Banion, who accepted Rains' proposed language memorializing the agreement. Rains and O'Banion also agreed that O'Banion would provide the Union's list of local arbitrators at some future date (Pet. App. 14a-15a; A. 128).

On December 10, Rains signed the written agreement and submitted it for execution to the Union. Instead of returning the agreement, however, the Union called a secret membership meeting, held on December 15, at which the membership unanimously voted to reject the agreement. The Company was not told of the meeting or of the membership vote (Pet. App. 15a; A. 174). The Union negotiating team subsequently refused to execute the agreement and insisted that the Company sign the Master Freight Agreement or face a strike (Pet. App. 15a-17a).

2. Upon charges filed by the Company, the Board determined that the Company and the Union had reached

an agreement regarding the contract, and that the Union's refusal to execute the agreement violated Section 8(b)(3) of the Act. The Board rejected the Union's contentions that agreement as to substantive provisions of the contract was never reached and that, even if it were, the Company knew that ratification by the membership was a condition precedent to consummation (Pet. App. 17a).

The Board ordered the Union to execute the bargaining agreement upon the Company's request (Pet. App. 8a, 23a-24a, 26a).

The court of appeals upheld the Board's decision and enforced its order, ruling that "there is clearly substantial evidence in the record viewed as a whole from which the Board could conclude that an agreement was reached" (Pet. App. 5a).

ARGUMENT

Petitioner argues that the Union and the Company negotiators never reached final agreement on all contract terms, and that therefore the Union's refusal to execute the agreement did not violate Section 8(b)(3). In particular, petitioner claims that agreement was not reached as to the grievance procedures since the parties never exchanged their lists of arbitrators. This essentially factual contention does not warrant further review by this Court.

In any event, the court of appeals correctly upheld the Board's order. The record shows that at the December 7 meeting the parties agreed to all of the essential parts of the contract, including the principle of selecting arbitrators from lists prepared by each party, and that the specific names on the lists were considered to be details that did not affect the substance of the agreement. After O'Banion requested additional time to

supply the Union's list of arbitrators, Rains submitted the contract to O'Banion for execution without the Union's list having been attached, and in this form O'Banion submitted it to the union membership, showing that neither Rains nor O'Banion considered the particular composition of the list an essential contract term. Even when the Union refused to execute the contract, it never based its refusal on the parties' failure to exchange lists. The names on the Union's list did not require the Company's approval; nor did the Company's list require approval by the Union.[2] In short, the Board correctly found that the parties had reached accord on the contract terms even though the exchange of lists was yet to come.

Since the parties had agreed, ordering the Union to execute the agreement was not, as petitioner suggests (Pet. 6-7), contrary to the federal policy of promoting labor peace by fostering "mutually agreed upon methods of arbitration and grievance settlement" (*id.* at 6). Nor does the decision below necessarily sanction resort by the Board to principles of contract law different from those that would apply in the federal courts (Pet. 8-11).[3] Contrary to petitioner's suggestion (Pet. 8), the Board did not rule that a mutually binding contract between union and company might be predicated upon agreement on less than all of the essential terms. Rather, it found that the timing of the exchange of lists was not essential to the agreement that the parties in this case had already reached. As we have shown, that finding is amply supported by the record.

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[2]The agreement contemplated that the mutual assent of the parties would be required before any individual could be selected from the combined lists to arbitrate a dispute (Pet. App. 38a).

[3]This argument, in any event, was not raised in the court of appeals and is therefore not properly presented here. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 76-80

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Petitioner.

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CHARGING PARTY DURO PAPER BAG MANUFACTURING COMPANY IN OPPOSITION

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TRUCKDRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AN AFFILIATE OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
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COUNTERSTATEMENT OF THE CASE

The major issues litigated befor the National Labor Relations Board and the Sixth Circuit Court of Appeals were:

1) Was there an agreement reached between the employer and the union?

2) Could the employer reasonably rely upon the ap-

parent authority of the union representatives to conclude the agreement?

These were primarily issues of fact. Three tribunals — the NLRB Administrative Law Judge, the members of the NLRB and the Court of Appeals have answered these questions affirmatively.

ARGUMENT

THE PETITION FOCUSES ON SPECIFIC QUESTIONS OF FACT WHICH HAVE BEEN DETERMINED BELOW BY THREE SEPARATE TRIBUNALS AND BECAUSE NO IMPORTANT ISSUES OF POLICY OR LAW ARE RAISED, THE CASE IS AN INAPPROPRIATE DISPUTE FOR REVIEW.

This Court has repeatedly held that it will not grant certiorari to review evidence and discuss specific facts. *United States* v. *Johnston,* 268 US 220 (1975).

The Court's rationale for its disinclination to review fact findings by lower tribunals was succinctly explained in *Kennedy* v. *Silas Mason Co.,* 334 US 249 (1948):

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is primarily for a court of one judge, not for a court of nine." 344 U.S. at 256.

Petitioner asserts that there was no meeting of the minds with respect to the arbitration clause and list of arbitrators. This is a factual contention rejected by all those tribunals that have considered the question.

The record shows that the joint list of arbitrators was to be completed by each party submitting a separate list. This was the recollection of the Company negotiator Rains (A 119 lines 25-30).[1] Union negotiator Rigney also recalls "both parties could pick so many men" (A 194 line 5).

Union negotiator O'Banion testified that he agreed to send over to Rains the union's list which, when combined with the employer's list, would be the "joint list" that was to be supplied as Exhibit 1 (A 127, 128).

According to the contract, the precise method of selecting which arbitrator on the list would be used for a particular case was left to the "mutual agreement" of the parties — which is not an unusual procedure in labor agreements. In summary there was substantial evidence in the record to support the findings of the administrative law judge, NLRB, and the Sixth Circuit.

All of the arguments of petitioner are founded on its opinion that the parties did not reach a "meeting of the minds" concerning the method of selection of the arbitrators. Petitioner seeks to relitigate this factual issue.

We believe the "two-court rule" to be applicable. This Court has held that the Supreme Court, which possesses no empirical expertise to set against careful and reasonable conclusions of lower courts and fact finding tribunals "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *District Director, Immigration and Naturalization Service,* 385 U.S. 630 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271 (1949); *Stewart* v. *Hayden,* 161 U.S. 1 (1898);

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[1] Record references are to the appendix in the United States Court of Appeals.

Comstock v. *Group of Institutional Investors,* 335 U.S. 211 (1948), and the long list of cases cited therein.

In the case at bar there has been concurrent findings by the Court and NLRB that the parties did reach substantial agreement upon the method of supplying the names of the arbitrators which would constitute the joint list and the manner of selection of the arbitrator. Such findings are free from obvious and exceptional error.

In all events the petition raises no novel or important issues of national policy. The case is inappropriate for review by the Supreme Court of the United States.

CONCLUSION

For all the above reasons the petition for certiorari should be denied.

Respectfully submitted,

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